IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33350

STATE OF IDAHO,	)	**2008 Opinion No. 3**
	)	
Plaintiff-Appellant,	)	**Filed: January 8, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
CHRISTOPHER WILLOUGHBY,	)	
	)	
Defendant-Respondent.	)	
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Charles W. Hosack, District Judge. Hon. Benjamin R. Simpson, Magistrate.

Order suppressing evidence in DUI prosecution, affirmed.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for appellant.

Frederick G. Loats, Coeur d'Alene, for respondent.

WALTERS, Judge Pro Tem

The State appeals from the district court's appellate decision affirming the magistrate's order granting Christopher Willoughby's motion to suppress evidence obtained by the police to prosecute him for driving while under the influence (DUI). We likewise affirm the magistrate's order suppressing the evidence.

I.
FACTS AND PROCEDURE

The following facts were found by the magistrate from the evidence presented at a hearing on Willoughby's motion to suppress. On July 4, 2005, Officers Gillmore and Carroll, of the Coeur d'Alene Police Department, were dispatched to a "physical fight in progress" in the parking lot of an apartment building located in Coeur d'Alene. Officer Gillmore arrived a few seconds before Officer Carroll. They were in separate patrol vehicles and arrived at the parking

lot under "Full Code," with overhead lights and sirens on.[1] When Officer Gillmore arrived, he saw a vehicle stopped behind some parked cars, with Willoughby in the driver's seat. There were three or four other persons present and at least one was a female getting out of Willoughby's car. Officer Gillmore parked about fifteen feet from Willoughby's vehicle and Officer Carroll parked just to the west of Gillmore. Both officers left their overhead lights on. Willoughby spontaneously stepped from his vehicle as Officer Gillmore exited his patrol vehicle and asked the persons present where the fight was. The persons present all denied any knowledge of a fight at that location. Officer Gillmore continued to ask about the fight and then noticed that Willoughby had "glassy droopy eyes, a long face, and was relaxed." Officer Gillmore also smelled the odor of an alcoholic beverage on or about Willoughby. Willoughby admitted driving his vehicle to the location.[2] Based upon his training, experience and observations, Officer Gillmore formed the opinion that Willoughby was possibly driving under the influence and asked Officer Carroll to take over for a DUI investigation. Officer Carroll, after performing a DUI investigation, ultimately arrested Willoughby for DUI.

Willoughby filed a motion to suppress all evidence obtained by the officers, contending that his detention by the officers while they conducted their investigation was not supported by reasonable, articulable suspicion. The magistrate granted Willoughby's motion. The magistrate determined that the officers' conduct in arriving at the parking lot with the overhead lights on their vehicles operating and leaving those lights on while they interrogated the people in the parking lot about the reported fight constituted a seizure of the persons present, including Willoughby. The magistrate also determined that the officers did not have reasonable suspicion to believe that the persons seized were engaged in, or about to engage in, criminal activity, to justify the seizure of Willoughby, or the other persons present. On appeal by the State to the district court, the magistrate's order suppressing evidence was upheld. The State then filed a timely appeal to this Court.

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[1] Although not specifically found by the magistrate as a finding of fact, the undisputed evidence showed that the officers were dispatched to the apartment parking lot at about 1:30 a.m. on July 4, 2005. Other than the officers' testimony that the overhead lights on the police vehicles were operating, no evidence was presented to show the lighting conditions in the parking lot.

[2] Officer Gillmore testified that Willoughby said "he was dropping people off and leaving the area."

II.
STANDARD OF REVIEW

On review of a decision of the district court, rendered in its appellate capacity, we examine the record of the trial court independently of, but with due regard for, the district court's intermediate appellate decision. *State v. Bowman*, 124 Idaho 936, 939, 866 P.2d 193, 196 (Ct. App. 1993). The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

III.
DISCUSSION

The State contends that the magistrate erred both in concluding that Willoughby was seized by the officers during their investigation and that there was not reasonable suspicion for the officers to believe a crime was being committed when the officers responded to the location of the parking lot. We will address these contentions in turn.

A. Seizure

The Fourth Amendment guarantees the right of every citizen to be free from unreasonable searches and seizures. However, the Fourth Amendment does not proscribe all contact between the police and citizens. *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 215 (1984); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). So long as a reasonable person would feel free to go about his or her business, an encounter with a police officer is consensual and the encounter need not be justified by reasonable suspicion. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16; *see also State v. Ferreira*, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999); *State v. Pick*, 124 Idaho 601, 604, 861 P.2d 1266, 1269 (Ct. App. 1993). In other words, unless the circumstances of the encounter are "so intimidating as to demonstrate that a reasonable person would have believed he [or she] was not free to leave if he [or she] had not responded," one cannot say that an officer's request results in a seizure within the meaning of the Fourth Amendment. *Delgado*, 466 U.S. at 216. As a result, a police officer generally does not violate the Fourth Amendment by merely approaching an individual on the

street or in another public place, by asking if the person is willing to answer some questions or by putting questions to him or her if the person is willing to listen. *Bostick*, 501 U.S. at 434; *State v. Zubizareta*, 122 Idaho 823, 826, 839 P.2d 1237, 1240 (Ct. App. 1992); *State v. Osborne*, 121 Idaho 520, 523, 826 P.2d 481, 484 (Ct. App. 1991).

The burden of proving that a seizure occurred is on the defendant seeking to suppress evidence allegedly obtained as a result of an illegal seizure. *State v. Page*, 140 Idaho 841, 843, 103 P.3d 454, 456 (2004); *State v. Reese*, 132 Idaho 652, 654, 978 P.2d 212, 214 (1999); *State v. Fuentes*, 129 Idaho 830, 832, 933 P.2d 119, 121 (Ct. App. 1997). Taking into account all the surrounding circumstances, the critical inquiry is whether a reasonable person would have felt free to disregard the police, decline the officer's request or otherwise terminate the encounter. *Page*, 140 Idaho at 843-44, 103 P.3d at 456-57; *State v. Nickel*, 134 Idaho 610, 613, 7 P.3d 219, 222 (2000); *Reese*, 132 Idaho at 653, 978 P.2d at 213; *State v. Gutierrez*, 137 Idaho 647, 650, 51 P.3d 461, 464 (Ct. App. 2002); *State v. Nelson*, 134 Idaho 675, 679, 8 P.3d 670, 674 (Ct. App. 2000); *Pick*, 124 Idaho at 604, 861 P.2d at 1269; *State v. Jordan*, 122 Idaho 771, 774, 839 P.2d 38, 41 (Ct. App. 1992); *State v. Fry*, 122 Idaho 100, 103, 831 P.2d 942, 945 (Ct. App. 1991).

The use of overhead signal lights on a police vehicle is one of the circumstances that is considered in determining whether a reasonable person in another vehicle in proximity to the police vehicle would be deemed seized by the officer's activities. This Court has recognized that where a police officer parked his vehicle behind the defendant's already-stopped vehicle on the roadside and the officer had his amber flashing lights on to alert oncoming traffic to the vehicles off the roadway, the defendant was not "seized" i.e., the defendant's "movement was not restricted for Fourth Amendment purposes by the officer's initial contact." *Pick*, 124 Idaho at 605, 861 P.2d at 1270. Nor does the use of a spotlight by the police to illuminate a parked vehicle, without also using overhead emergency lights, constitute a show of authority that would lead a reasonable person to believe that he or she was not free to leave. *State v. Baker*, 141 Idaho 163, 107 P.3d 1214 (2004).

A different result may obtain where the officer's vehicle displays its colored emergency lights. Thus, by application of statutory provisions regulating motor vehicle traffic, we said in *State v. Mireles*, 133 Idaho 690, 991 P.2d 878 (Ct. App. 1999):

> Here, by contrast, [Officer] Hulse's act of turning on the overhead lights, although not necessarily intended to create a detention, did constitute a technical, *de facto* detention commanding Mireles to remain stopped pursuant to I. C. § 49-625. A person is seized within the meaning of the Fourth Amendment if, in view of all the circumstances, a reasonable person would have believed he or she was no longer free to leave. *State v. Waldie*, 126 Idaho 864, 866, 893 P.2d 811, 813 (Ct. App. 1995). Once Hulse activated the police car's emergency lights, Mireles, assuming he was cognizant of the fact, was not free to drive away. See I.C. § 49-1404 (prohibiting fleeing or attempting to elude a police officer when signaled to stop by the officer's emergency lights and/or siren).

133 Idaho at 692, 991 P.2d at 880. In *Mirales*, just as in Willoughby's circumstance, the defendant's vehicle was already stopped before the police vehicle arrived with its emergency lights flashing. Similarly, in *State v. Schmidt*, 137 Idaho 301, 47 P.3d 1271 (Ct. App. 2002), this Court held that the police officer's act of parking his vehicle in such away to block an exit route and with the vehicle's overhead emergency lights on constituted a seizure of a parked vehicle in which the defendant was a passenger, which seizure was not justified under a community caretaking function. In *Guiterrez*, 137 Idaho 647, 51 P.3d 461, we held that once the purpose of a traffic stop for speeding had been fulfilled but the driver had not been informed by the police officer that he was free to go on his way, and instead was interrogated by the officer about matters unrelated to the traffic stop until the defendant consented to a search of his vehicle, while the patrol car's overhead lights remained on, the overhead lights was an indicia that the defendant had been seized. Relying on I.C § 49-625 and I.C. § 49-1404, we said "[the] use of the emergency lights was indicative of a continued detention." *Gutierrez*, 137 Idaho at 651, 51 P.3d at 465.

On the other hand, where an officer told the defendant several times that he was free to go after having stopped the defendant for an equipment violation, the continued operation of the flashing emergency lights on the police vehicle "did not constitute a continued show of authority detaining [the driver,] Roark in the face of at least two notifications from the officer that he was free to go." *State v. Roark*, 140 Idaho 868, 871, 103 P.3d 481, 484 (Ct. App. 2004). We said:

> Idaho Code § 49-625 requires drivers to stop when approached by a police vehicle with activated emergency lights and to remain stopped until the police vehicle has passed "except when otherwise directed by a peace officer." Roark was "otherwise directed" when he was told that he could go. Section 49-1404 prohibits a driver from willfully fleeing or attempting to elude a police vehicle that is giving a visual signal to stop. A driver could not be deemed to be fleeing if he departed upon being given permission to do so by the officer. Thus, neither I.C. § 49-625 nor I.C. § 49-1401(1) required Roark to remain at the site of the

> traffic stop after the officer authorized him to leave. It is not practical nor necessary that an officer turn off his emergency lights before he may effectively instruct an individual who has been stopped that he may leave. No reasonable person who has been unequivocally told that he may go, as Roark was, would believe that he should disregard the statement merely because the patrol car's overhead lights are still flashing.

Roark, 140 Idaho at 871, 103 P.3d at 484. Furthermore, the mere use of flashing overhead lights by a police car that are not seen or observed by the driver of an already-stopped vehicle does not amount to a seizure of the driver because the police conduct has not been communicated to the driver as a show of authority exhibited by the officer. *Matter of Mackey*, 124 Idaho 585, 861 P.2d 1250 (Ct. App. 1993).

Here, the facts found by the magistrate show that the officers arrived at the parking lot with their overhead lights activated. The lights remained activated while the officers interviewed the persons present about the reported fight. The officers did not see any fight in progress. Willoughby observed the overhead lights, exited his car and approached the officers to find out what they were doing. After the officers were told by the people present in the parking lot that there was no fight, the officers did not deactivate their emergency lights nor did they tell Willoughby that he was free to drive away from the scene. The totality of these circumstances pursuant to *Mireles* and the application of I.C §§ 49-625 and 49-1401(1) would not have led a reasonable motorist to infer that he was free to ignore the officers' questions and drive away. We conclude that for Fourth Amendment purposes, Willoughby was seized by the officers when they arrived at the parking lot with their overhead lights flashing and remained so while the officers investigated him for DUI.

B. Reasonable Suspicion

The magistrate considered the totality of the circumstances in his analysis concerning reasonable suspicion to support the seizure. The court determined that in order to conduct a lawful seizure, the officers had to reasonably suspect, at the time the seizure occurred, that Willoughby or the others present were engaged in or about to engage in some unlawful conduct. *See State v. Sheldon*, 139 Idaho 980, 983; 88 P.3d 1220, 1223 (Ct. App. 2003), holding that the justification for an investigative detention is evaluated upon the totality of the circumstances then known to the officer, citing *United States v. Cortez,* 449 U.S. 411, 418 (1981) and *State v. Rawlings,* 121 Idaho 930, 932, 829 P.2d 520, 522 (1992), and that the information available to the detaining officers must show a "particularized and objective basis for suspecting the

particular person stopped of criminal activity," again citing *Cortez*, 449 U.S. at 417-18. *See also Florida v. Royer*, 460 U.S. 491, 498, (1983); *State v. Salato*, 137 Idaho 260, 264, 47 P.3d 763, 767 (Ct. App. 2001).

The requisite reasonable suspicion may be provided by an informant's tip or a citizen's report of suspect activity. *State v. Larson*, 135 Idaho 99, 101, 15 P.3d 334, 336 (Ct. App. 2000). Whether information from such a source is sufficient to create reasonable suspicion depends upon the content and reliability of the information presented by the source. *Id*. An anonymous tip standing alone is generally not enough to justify a stop because such a tip alone seldom demonstrates the informant's basis of knowledge or veracity. *Illinois v. Gates*, 462 U.S. 213 (1983). In this regard, the United States Supreme Court has explained:

> The opinion in [*Illinois v. Gates*, 462 U.S. 213 (1983)] recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of the everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypotheses largely unknown.' [Citation omitted.] This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop. But the tip in *Gates* was not an exception to the general rule, and the anonymous tip in this case is like the one in *Gates*: "[It] provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable; likewise, the [tip] gave absolutely no indication of the basis for the [caller's] predictions regarding [White's] criminal activities.

Alabama v. White, 496 U.S. 325, 329 (1990).

The Idaho Supreme Court has recognized that: "Although the tip standing alone is insufficient, it may contribute to the necessary reasonable suspicion when coupled with the officer's own corroboration of significant details of the tip." *State v. Hankey*, 134 Idaho 844, 848, 11 P.3d 40, 44 (2000). Here, the magistrate considered the totality of the circumstances presented by the evidence at the hearing on the suppression motion. The magistrate ruled:

> As the officers rolled to a stop near Mr. Willoughby's vehicle with their lights on the information they had was that they were dispatched to a fight in progress at the location. They had no other information about who called that information in. They did not have any information about who was involved in the fight or if there was a vehicle involved. Under these circumstances the court concludes the officers had no reasonable suspicion to justify the seizure of Mr. Willoughby, or the other persons present.

The transcript of the hearing on Willoughby's motion to suppress reveals that no evidence was presented to show the source of the information provided to the dispatcher or that

the officers who responded to the dispatch were privy to any information other than that given to them by the dispatch before they arrived at the scene. The magistrate properly treated the information about the fight in the parking lot as coming from an anonymous informant who was without any indicia of veracity or reliability or basis for knowledge of alleged criminal activity by Willoughby. In this regard, the magistrate relied upon the recent decision of this Court in *State v. Cerino*, 141 Idaho 736, 117 P.3d 876 (Ct. App. 2005). There we noted that:

> [T]the Fourth Amendment is not violated when a police officer stops a vehicle for investigative purposes if the officer has a reasonable and objective basis for suspecting that the vehicle or an occupant is involved in criminal activity. The information required for reasonable suspicion is less than is required for probable cause, but it must be more than mere speculation or a hunch on the part of the police officer. There must be "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The reasonableness of the officer's suspicion is evaluated based upon the totality of the circumstances at the time of the seizure.

Cerino, at 739, 117 P.3d at 879 (citations omitted). In *Cerino* we determined that the anonymous tip did not bear sufficient indicia of reliability to create reasonable suspicion that Cerino had been or was about to be engaged in criminal activity. We then reviewed other information that the officers may have been aware of and found that none of it was sufficient to raise a reasonable suspicion of criminal activity on the part of Cerino.

Here the anonymous assertion that there was fight in progress at the parking lot was without any indicia of reliability and its validity was disproved when the officers arrived at the scene of the alleged fight, found no fight in progress, and were advised by all persons present that there was no occurring fight. The officers possessed no other information about the fight than the anonymous representation which had proven baseless immediately upon their arrival at the scene. As noted by the district court in its appellate opinion in this case: "[I]t would be illogical to think that the officers had witnessed enough activity in the parking lot that could be corroborated by the dispatch to rise to a level of reasonable suspicion." We likewise conclude that the police lacked a reasonable suspicion of criminal activity, and that the officers improperly continued their detention of Willoughby through the use of their overhead lights while they investigated him for DUI.[3]

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[3] In the closing paragraph of his opinion granting Willoughby's suppression motion, the magistrate saliently observed: "Had the officers turned off their overhead lights before

IV.

CONCLUSION

Accordingly, we concur with the magistrate that there was no reasonable, articulable suspicion that justified the officers' seizure of Willoughby through the use of their vehicles' overhead emergency lights. The evidence that was subsequently obtained by the officers to prosecute Willoughby for driving while under the influence properly was suppressed by the magistrate.

The order of the magistrate suppressing the evidence is affirmed.

Judge LANSING and Judge PERRY **CONCUR**.

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approaching Mr. Willoughby and the others there would have been no seizure and the questioning would have been permissible."